

LATHAM & WATKINS LLP
 Steven M. Bauer (Bar No. 135067)
 steven.bauer@lw.com
 Sadik Huseny (Bar No. 224659)
 sadik.huseny@lw.com
 Amit Makker (Bar No. 280747)
 amit.makker@lw.com
 Shannon D. Lankenau (Bar No. 294263)
 shannon.lankenau@lw.com
 505 Montgomery Street, Suite 2000
 San Francisco, CA 94111
 Telephone: 415.391.0600
 Facsimile: 415.395.8095

LATHAM & WATKINS LLP
 Richard P. Bress (*pro hac vice*)
 rick.bress@lw.com
 Melissa Arbus Sherry (*pro hac vice*)
 melissa.sherry@lw.com
 Anne W. Robinson (*pro hac vice*)
 anne.robinson@lw.com
 Tyce R. Walters (*pro hac vice*)
 tyce.walters@lw.com
 Genevieve P. Hoffman (*pro hac vice*)
 genevieve.hoffman@lw.com
 Gemma Donofrio (*pro hac vice*)
 gemma.donofrio@lw.com
 555 Eleventh Street NW, Suite 1000
 Washington, D.C. 20004
 Telephone: 202.637.2200
 Facsimile: 202.637.2201

LAWYERS' COMMITTEE FOR
 CIVIL RIGHTS UNDER LAW
 Kristen Clarke (*pro hac vice* forthcoming)
 kclarke@lawyerscommittee.org
 Jon M. Greenbaum (Bar No. 166733)
 jgreenbaum@lawyerscommittee.org
 Ezra D. Rosenberg (admitted *pro hac vice*)
 erosenberg@lawyerscommittee.org
 Dorian L. Spence (*pro hac vice* forthcoming)
 dspence@lawyerscommittee.org
 Ajay P. Saini (admitted *pro hac vice*)
 asaini@lawyerscommittee.org
 Maryum Jordan (Bar No. 325447)
 mjordan@lawyerscommittee.org
 Pooja Chaudhuri (Bar No. 314847)
 pchaudhuri@lawyerscommittee.org
 1500 K Street NW, Suite 900
 Washington, D.C. 20005
 Telephone: 202.662.8600
 Facsimile: 202.783.0857

*Additional counsel and representation
 information listed in signature block*

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, JR., et al.,

Defendants.

CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' PRIVILEGE
 OBJECTIONS**

Date: TBD
 Time: TBD
 Place: Courtroom 8
 Judge: Hon. Lucy H. Koh

Pursuant to the Court's September 29, 2020 Order Re: Defendants' September 29 Privilege Log (ECF No. 236), Plaintiffs submit the following objections to Defendants' assertions of privilege in their September 29 privilege log. To avoid duplication, Plaintiffs incorporate their prior filings describing the scope of the attorney-client privilege, attorney work product protection, and deliberate process privilege. (ECF Nos. 149 & 170).

Defendants' privilege log (even as revised, per the Court's Order) and declaration fail to provide a sufficient basis to assess or uphold their assertions of privilege.

First, Defendants redact three documents on the basis of attorney client privilege and attorney work product protection. To properly assert attorney-client privilege "[i]n the Ninth Circuit, a privilege log must identify '(a) the attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated.'" *Apple Inc. v. Samsung Electronics Co., Ltd.*, 306 F.R.D. 234, 237 (N.D. Cal. 2015) (quoting *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992)).

Defendants fail to provide the required information. Despite being ordered by the Court to provide the specific attorney names in order to satisfy Federal Rule of Civil Procedure 26(b)(5)(A)(ii) (ECF No. 236), Defendants filed a revised log stating "individual attorney or attorneys unknown." (ECF No. 240-1). Thus, in each case Defendants have provided no information regarding the author of the document, its recipients, or the attorneys involved. Moreover, the only description of the nature of the legal advice is the following bare-bones verbatim description for each of the three documents:

Draft presentation reflecting confidential [*sic*] legal advice of the Department of Commerce's [*sic*] Office of General Counsel prepared during the course of litigation regarding the Census Bureau's proposed options for completing enumeration.

ECF Nos. 232-1 & 240-1.

The accompanying declaration states in a similarly conclusory fashion that the redacted sentences "express legal conclusions reached by DOC attorneys during the course of this

litigation and contain confidential communications and professional legal advice from Department attorneys that were sought out by their clients in the Census Bureau and the Department in order to guide the Secretary’s decisionmaking process.” DiGiacomo Dec. ¶ 14. These descriptions fail to sufficiently describe the nature of the documents or the context necessary to assess whether legal advice was communicated. *See, e.g., Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 350641, at *3 (N.D. Cal. Feb. 2, 2008) (“A vague declaration that states only that the document ‘reflects’ an attorney’s advice is insufficient to demonstrate that the document should be found privileged.”); *In re Application of Republic of Ecuador*, 280 F.R.D. 506, 514 n.5 (N.D. Cal. 2012) (“these communications are not attorney-client privileged, as they contain no communication between client and attorney”), *aff’d, Rep. of Ecuador v. Mackay*, 742 F.3d 360 (9th Cir. 2014).

Defendants’ claim of work product protection is similarly insufficient. Defendants make a passing assertion that the redacted conclusions were reached “during the course of this litigation” (DiGiacomo Dec. ¶ 14), but to qualify under the work product doctrine the document must “have been prepared or obtained because of the prospect of litigation.” *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004).

Second, Defendants assert that portions of an “[e]mail communication from Secretary Ross to his senior advisors at the Department of Commerce and the Census Bureau” are protected by the deliberative process privilege. While the declaration asserts that the redacted language is pre-decisional and deliberative, it does not explain why the privilege should not be overcome. *See FTC v. Warner Comm’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Defendants have produced little if any documentation of a reasonable and thoughtful administrative process leading to reaching the October 5 date. Nor do Defendants even attempt to point to other comparable evidence. *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (availability of comparable evidence from sources other than the government is “perhaps the most important factor in determining whether the deliberative process privilege should be overcome”). Any assertion of privilege is outweighed by Plaintiffs’ need for this information, which very well may demonstrate the arbitrariness of the Secretary’s decision.

Dated: September 29, 2020

LATHAM & WATKINS LLP

By: /s/ Sadik Huseny
Sadik Huseny

Steven M. Bauer (Bar No. 135067)
steven.bauer@lw.com
Sadik Huseny (Bar No. 224659)
sadik.huseny@lw.com
Amit Makker (Bar No. 280747)
amit.makker@lw.com
Shannon D. Lankenau (Bar. No. 294263)
shannon.lankenau@lw.com
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Telephone: 415.391.0600
Facsimile: 415.395.8095

Richard P. Bress (admitted *pro hac vice*)
rick.bress@lw.com
Melissa Arbus Sherry (admitted *pro hac vice*)
melissa.sherry@lw.com
Anne W. Robinson (admitted *pro hac vice*)
anne.robinson@lw.com
Tyce R. Walters (admitted *pro hac vice*)
tyce.walters@lw.com
Genevieve P. Hoffman (admitted *pro hac vice*)
genevieve.hoffman@lw.com
Gemma Donofrio (admitted *pro hac vice*)
gemma.donofrio@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, D.C. 20004
Telephone: 202.637.2200
Facsimile: 202.637.2201

*Attorneys for Plaintiffs National Urban League;
League of Women Voters; Black Alliance for
Just Immigration; Harris County, Texas; King
County, Washington; City of San Jose,
California; Rodney Ellis; Adrian Garcia; and
the NAACP*

Dated: September 29, 2020

By: /s/ Jon M. Greenbaum
Kristen Clarke (*pro hac vice* forthcoming)
kclarke@lawyerscommittee.org
Jon M. Greenbaum (Bar No. 166733)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (admitted *pro hac vice*)
erosenberg@lawyerscommittee.org
Dorian L. Spence (*pro hac vice* forthcoming)
dspence@lawyerscommittee.org
Maryum Jordan (*pro hac vice* forthcoming)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

mjordan@lawyerscommittee.org
Ajay Saini (admitted *pro hac vice*)
asaini@lawyerscommittee.org
Pooja Chaudhuri (Bar No. 314847)
pchaudhuri@lawyerscommittee.org
**LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW**
1500 K Street NW, Suite 900
Washington, DC 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

*Attorneys for Plaintiffs National Urban League;
City of San Jose, California; Harris County,
Texas; League of Women Voters; King County,
Washington; Black Alliance for Just
Immigration; Rodney Ellis; Adrian Garcia; the
NAACP; and Navajo Nation*

Wendy R. Weiser (admitted *pro hac vice*)
weiserw@brennan.law.nyu.edu
Thomas P. Wolf (admitted *pro hac vice*)
wolf@brennan.law.nyu.edu
Kelly M. Percival (admitted *pro hac vice*)
percivalk@brennan.law.nyu.edu
BRENNAN CENTER FOR JUSTICE
120 Broadway, Suite 1750
New York, NY 10271
Telephone: 646.292.8310
Facsimile: 212.463.7308

*Attorneys for Plaintiffs National Urban League;
City of San Jose, California; Harris County,
Texas; League of Women Voters; King County,
Washington; Black Alliance for Just
Immigration; Rodney Ellis; Adrian Garcia; the
NAACP; and Navajo Nation*

Mark Rosenbaum (Bar No. 59940)
mrosenbaum@publiccounsel.org
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: 213.385.2977
Facsimile: 213.385.9089

Attorneys for Plaintiff City of San Jose

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Doreen McPaul, Attorney General
dmcpaul@nndoj.org
Jason Searle (*pro hac vice* forthcoming)
jasearle@nndoj.org
NAVAJO NATION DEPARTMENT OF JUSTICE
P.O. Box 2010
Window Rock, AZ 86515
Telephone: (928) 871-6345

Attorneys for Navajo Nation

Dated: September 29, 2020

By: /s/ Danielle Goldstein
Michael N. Feuer (Bar No. 111529)
mike.feuer@lacity.org
Kathleen Kenealy (Bar No. 212289)
kathleen.kenealy@lacity.org
Danielle Goldstein (Bar No. 257486)
danielle.goldstein@lacity.org
Michael Dundas (Bar No. 226930)
mike.dundas@lacity.org
CITY ATTORNEY FOR THE CITY OF LOS ANGELES
200 N. Main Street, 8th Floor
Los Angeles, CA 90012
Telephone: 213.473.3231
Facsimile: 213.978.8312

Attorneys for Plaintiff City of Los Angeles

Dated: September 29, 2020

By: /s/ Michael Mutalipassi
Christopher A. Callihan (Bar No. 203010)
legalwebmail@ci.salinas.ca.us
Michael Mutalipassi (Bar No. 274858)
michaelmu@ci.salinas.ca.us
CITY OF SALINAS
200 Lincoln Avenue
Salinas, CA 93901
Telephone: 831.758.7256
Facsimile: 831.758.7257

Attorneys for Plaintiff City of Salinas

1 Dated: September 29, 2020

By: /s/ Rafey S. Balabanian
Rafey S. Balabanian (Bar No. 315962)
rbalabanian@edelson.com
Lily E. Hough (Bar No. 315277)
lthough@edelson.com
EDELSON P.C.
123 Townsend Street, Suite 100
San Francisco, CA 94107
Telephone: 415.212.9300
Facsimile: 415.373.9435

7 Rebecca Hirsch (admitted *pro hac vice*)
rebecca.hirsch2@cityofchicago.org
8 **CORPORATION COUNSEL FOR THE**
9 **CITY OF CHICAGO**
Mark A. Flessner
Stephen J. Kane
10 121 N. LaSalle Street, Room 600
Chicago, IL 60602
11 Telephone: (312) 744-8143
12 Facsimile: (312) 744-5185

13 *Attorneys for Plaintiff City of Chicago*

14 Dated: September 29, 2020

By: /s/ Donald R. Pongrace
Donald R. Pongrace (admitted *pro hac vice*)
dpongance@akingump.com
16 **AKIN GUMP STRAUSS HAUER & FELD**
17 **LLP**
2001 K St., N.W.
Washington, D.C. 20006
18 Telephone: (202) 887-4000
19 Facsimile: 202-887-4288

20 Dario J. Frommer (Bar No. 161248)
dfrommer@akingump.com
21 **AKIN GUMP STRAUSS HAUER & FELD**
22 **LLP**
1999 Avenue of the Stars, Suite 600
Los Angeles, CA 90067-6022
23 Phone: 213.254.1270
24 Fax: 310.229.1001

25 *Attorneys for Plaintiff Gila River Indian*
26 *Community*

1
2 Dated: September 29, 2020

By: /s/ David I. Holtzman
David I. Holtzman (Bar No. 299287)
David.Holtzman@hklaw.com
HOLLAND & KNIGHT LLP
Daniel P. Kappes
Jacqueline N. Harvey
50 California Street, 28th Floor
San Francisco, CA 94111
Telephone: (415) 743-6970
Fax: (415) 743-6910

Attorneys for Plaintiff County of Los Angeles

3
4
5
6
7
8
9
10 **ATTESTATION**

11 I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this
12 document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred
13 in this filing.

14 Dated: September 29, 2020

LATHAM & WATKINS LLP

15 By: /s/ Sadik Huseny
16 Sadik Huseny
17
18
19
20
21
22
23
24
25
26
27
28